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NEWSLETTER

Enhanced Debriefings: A Rocky Road From the Class Deviation to DOD's Proposed DFARS Implementation

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Section 818 of the Fiscal Year 2018 National Defense Authorization Act (NDAA) amended 10 U.S.C. § 2305 to provide "enhanced" post-award debriefing rights for offerors in connection with U.S. Department of Defense (DOD) procurements for competitively-awarded contracts procured under Federal Acquisition Regulation (FAR) Part 15, and for awards of task or delivery orders under Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts over $10 million. In addition to providing a right to ask questions if submitted within two business days following a debriefing, Section 818 kept the debriefing open until the Government provided written responses to those questions, and thus amended the Competition in Contracting Act (CICA) to extend the time period for filing a timely protest and receiving a stay of performance.

For several years, Section 818 has been implemented through DOD Class Deviation 2018-O0011, which provided most, but not all, of the enhanced debriefing rights afforded by Section 818. In particular, the Class Deviation did not expressly state that offerors could request and receive a redacted copy of the source selection decision, a right afforded to small businesses and nontraditional defense contractors for awards over $10 million and for all contractors for awards over $100 million. On May 20, 2021, DOD published a proposed rule to incorporate the full scope of the enhanced debriefing rights into the Defense Federal Acquisition Regulation Supplement (DFARS). Comments on the proposed rule are due July 19, 2021. Although it might be expected that migrating the Class Deviation to the DFARS, and adding the right to a redacted decision, would be largely a

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ministerial activity, a closer examination of the proposed DFARS clauses reveals at least six material inconsistencies in the proposed rule that contractors might want to flag in comments or, at a minimum, review in the final form to see if and how they are remedied.

First, the enhanced debriefing rights are incorporated in proposed DFARS 215.506 for contracts and DFARS 216.505 for task orders under ID/IQ contracts. Proposed DFARS 215.506(b) states that "when requested" " a written or oral debriefing is required when awarding a contract valued at $10 million or more . . . ." The "when requested" caveat relates back to FAR 15.506(a)(1), which states that "[a]n offeror, *upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award* . . . shall be debriefed and furnished the basis for the selection decision and contract award." In other words, the enhanced debriefing rights are not automatic for either a successful or unsuccessful offeror: you still must make a *timely request* for a debriefing. Proposed DFARS 216.505(b)(6) has similar text for task orders over $6 million, but states that a debriefing is required if the task order is over $10 million. But, this provision is ambiguous because it could be subject to materially different interpretations. One ambiguity is that the provision could be read to mean that a debriefing is required, even if not requested, if the award is more than $10 million. A second, potentially more troublesome ambiguity, is if the provision is read to eliminate the right to a debriefing, even if timely requested, for an award less than $10 million. In particular, FAR 15.506(a)(1) provides that for *any* FAR Part 15 procurement, an offeror can obtain a post-award debriefing if it makes a timely request, and FAR 16.505(b)(6)(ii) requires a debriefing for any task order award over *$6 million* in accordance with the procedures in FAR 15.506. And, neither 10 U.S.C. § 2305(b), which was amended pursuant to Section 818, nor the Class Deviation in place for three years, made a distinction based on dollar value: *all* DOD required debriefings provided a right to ask follow-up questions within two business days and have the debriefing remain open until the Government provides its written responses.

This disconnect may be because Section 818 (a)(2) itself states a requirement to provide a written or oral debriefing for all contract and task order awards over $10 million. But, it does not state that a debriefing is *not* required at all for DOD contracts or task orders under $10 million. Surely Section 818, intended to *increase* debriefing rights, cannot be interpreted to eliminate the right to *any* debriefing for DOD contracts or task orders under $10 million when a timely request is made. DFARS 215.506 and 216.505 thus should be amended to reflect 10 U.S.C. § 2305(b)(5), not Section 818(a)(2), and should consistently reflect that a debriefing is required when timely requested, regardless of dollar value.

Second, proposed DFARS 215.506(d) incorporates the right to request a copy of the source selection decision. DFARS 215.506(d)(i) provides that for contract awards over $10 million but not in excess of $100 million, a small business or nontraditional contractor can request a copy of the source selection decision, redacted if necessary to protect proprietary information. DFARS 215.506(d)(ii) provides for "disclosure" of the written source selection decision, redacted if necessary, for any award over $100 million. Admittedly, the text of the proposed DFARS provision again tracks Section 818. Nonetheless, it is somewhat confusing why DFARS 215.506(d)(i) precludes receiving a copy of a requested source selection decision for awards over $100 million when DFARS 215.506(d)(ii) implies that the source selection decision is "disclosed" as a matter of course for procurements over $100 million. DOD should simply delete "and not in excess of $100 million" from DFARS

215.506(d)(i); the deletion is consistent with the apparent intent of Section 818. The provision also would read more clearly if DFARS 215.506(d)(ii) were modified to state that the source selection decision, with any necessary redactions, will be provided as part of the debriefing, rather than referring to the provision of that decision as a "disclosure," which may confuse some Contracting Officers or contractors as to whether the decision must be affirmatively requested.

Third, DFARS 215.506 is modified by a proposed clause (S-70) to incorporate the right to ask questions regarding the debriefing so long as they are submitted in writing within two "business days" – an important difference from the usual protest focus on "calendar days." That proposed provision further states that the debriefing will not be considered closed, and thus protest timelines start to run, until "[a]fter the second business day after delivering the debriefing, if no additional questions are received" or "[t]he agency delivers its written responses to timely submitted additional questions." This provision is presumably intended to track the Federal Circuit's decision in *Nika Techs. v. United States*, 987 F.3d 1025 (Fed. Cir. 2021), which we wrote about in a prior newsletter, but it does not. In *Nika*, the Federal Circuit focused on the plain meaning of the relevant provision of CICA, 31 U.S.C. § 3553(d)(4)(A)(ii), and held that the two-day period for additional questions under the enhanced debriefing provisions of Section 818 does not extend the debriefing if the contractor does not submit any questions. In other words, in that situation, the debriefing concludes *on the same day it is offered*, not two business days later. 987 F.3d at 1028 ("We hold that the plain meaning of the statute is that the deadline in 31 U.S.C. § 3553(d)(4)(A)(ii) is five days after receipt of debriefing. *In other words, we hold that the debriefing is not automatically held open for an additional two days*.") (emphasis added). Proposed clause (S-70), by contrast, states that the debriefing would be "held open" and close after the second business day. Although contractors would undoubtedly appreciate the additional time afforded by the proposed DFARS clause, *Nika* suggests that it may be in conflict with CICA.

Fourth, and related, proposed (S-70) conflicts with the proposed revisions to DFARS 233.104. That proposed provision states that a stay of performance will be put in place upon notice from the U.S. Government Accountability Office (GAO) that a protest has been filed (A) within 10 days of award; (B) "Within 5 days after the date that was offered to an unsuccessful offeror for a debriefing that is requested, and when requested is required, *and the unsuccessful offeror submits no additional questions related to the debriefing*;" (C) within five days after the award of a requested and required debriefing "if the debriefing date offered is not accepted;" or (D) within five days "commencing on the day the Government delivers its written response to additional questions timely submitted by the unsuccessful offeror, when a requested and required debriefing is held on the date offered (31 U.S.C. 3553)." All of the deadlines in CICA for receiving a stay of performance flow from the date when a debriefing is considered closed. Yet, (S-70) in defining when a debriefing closes conflicts with DFARS 233.104 identifying when a stay of performance is required in two critical ways. First, (S-70) states that the debriefing closes after the second business day after receipt of a debriefing if no questions are submitted, and DFARS 233.104 would indicate that the debriefing closes on the date the debriefing is received, if no further questions asked (*i.e.*, the *Nika* holding). Second, (S-70) does not include the same text regarding a debriefing date that is requested and required, but where the debriefing date offered is not accepted. Aligning the text of these two provisions, which go hand-in-hand, would prevent confusion, provide clarity, and avoid inevitable disputes on timeliness.

Fifth, there are additional ambiguities and inconsistencies in the proposed DFARS clauses for solicitations and contracts. For example, proposed DFARS 252.215-70XX and DFARS 252.216-70YY, like DFARS 215.506 and 216.506, both provide that a debriefing is required only for contracts or task orders over $10 million, which as discussed above conflicts with the FAR and 10 U.S.C. § 2305(b). Both clauses also are internally inconsistent: both state that the debriefing is not concluded until two business days after the agency delivered the debriefing, and both state that contract performance must be stayed if a protest is received within five days of the debriefing and no follow up questions were submitted.

Finally, proposed DFARS 233.104 and both proposed DFARS clauses state that when a timely notice of a protest is received from GAO, the Contracting Officer "shall immediately suspend performance or terminate the awarded contract, task order, or delivery order." This is unusual only in that "termination" of the awarded contract or task order is not the usual mechanism for implementing the stay. In the normal course, a stop work order is issued. The contract or task order usually remains in place unless the agency takes corrective action.

The bottom line is that the proposed DFARS rule is not a plain vanilla implementation of the Class Deviation. Contractors should review the proposed rule carefully, consider commenting to DOD, and be alert to the final rule. In all things bid protest, timing is everything.